

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute and regulations involved.....	2
Statement.....	3
Argument.....	6
Conclusion.....	17
Appendix.....	18

CITATIONS

Cases:

<i>American Medical Association v. United States</i> , 317 U. S. 519.....	10
<i>Bowles v. Indianapolis Glove Co.</i> , 150 F. 2d 597, certiorari denied, 326 U. S. 794.....	14
<i>Bowles v. Leithold</i> , 155 F. 2d, 124 certiorari denied, March 25, 1946, sub. nom. <i>Leithold v. Porter</i> , No. 826, October Term, 1945.....	13
<i>Bowles v. Lentin</i> , 151 F. 2d 615.....	14
<i>Bowles v. Sanden & Ferguson Co.</i> , 149 F. 2d 330.....	11
<i>Bowles v. Seminole Rock & Sand Co.</i> , 145 F. 2d 482, reversed, 325 U. S. 410.....	7, 10
<i>Bowles v. Sisk</i> , 144 F. 2d 163.....	14
<i>Crawford & Doherty Foundry Co. v. Bowles</i> , 146 F. 2d 861.....	11
<i>Goodyear Tire & Rubber, Inc., v. Ray-O-Vac Co.</i> , 321 U. S. 275.....	9
<i>Henderson v. Burd</i> , 133 F. 2d 515.....	11
<i>Philadelphia Coke Co. v. Bowles</i> , 139 F. 2d 349.....	11
<i>Speten v. Bowles</i> , 146 F. 2d 602, certiorari denied, 324 U. S. 877.....	10
<i>United States v. Pepper Brothers</i> , 142 F. 2d 340.....	11
<i>United States v. Commercial Credit Co., Inc.</i> , 286 U. S. 63.....	9
<i>Wells Lamont Corp. v. Bowles</i> , 149 F. 2d 364, certiorari denied, 326 U. S. 730.....	14
<i>Williams Manufacturing Co. v. Shoe Machine Corp.</i> , 316 U. S. 364.....	9
<i>Yakus v. United States</i> , 321 U. S. 414.....	11

Statute and Regulations:

Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Sec. 901 et seq.:	
Section 2 (h).....	11, 18
Section 4 (a).....	18
Section 204(d).....	11
Section 205 (a).....	19
Section 302 (a).....	19

II

Statute and Regulations—Continued	Page
General Maximum Price Regulation (7 F. R. 3153, 4659; 9 F. R. 1385).....	9, 10, 25
Maximum Price Regulation 118 (7 F. R. 3038, 3824, 9969).....	7, 22
Maximum Price Regulation 127 (7 F. R. 3119, 4180, 4762).....	7, 24
Revised Price Schedule 35 (6 F. R. 5335; 7 F. R. 714, 931, 1270; 9 F. R. 2790).....	7, 19
Revised Price Schedule 89 (7 F. R. 715, 22-99).....	7, 21
Revised Procedural Regulation No. 1 (7 F. R. 8961).....	14
Miscellaneous:	
Federal Rules of Civil Procedure, Rule 15.....	15
House Report No. 1409, 77th Congress, 1st session.....	12
Manual of Digests of Interpretations of Specific Price Schedules and Regulations, Office of Price Administra- tion, March 15, 1943.....	7, 29
Senate Report No. 931, 77th Congress, 2d session.....	12

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 319

MANNIE & Co., a CORPORATION, MANUEL FEFFER-
MAN, MEYER FEFFERMAN AND ROSE FEFFERMAN,
INDIVIDUALLY AND DOING BUSINESS AS MERCANTILE
TRADING COMPANY, PETITIONERS

v.

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE
ADMINISTRATION FOR AND ON BEHALF OF THE
UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The district court rendered no opinion. The findings of fact and conclusions of law of that court appear at pages 128-132 of the record. The opinion of the circuit court of appeals (R. 182-191) is reported in 155 F. 2d 129.

JURISDICTION

The judgment of the circuit court of appeals was entered on March 13, 1946 (R. 192). A

petition for rehearing was denied on April 22, 1946 (R. 193). The petition for a writ of certiorari was filed on July 22, 1946. The jurisdiction of this Court is apparently invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347 (a)).

QUESTIONS PRESENTED

1. Whether the court below erred in affirming the trial court's findings that sales by Mercantile Trading Company to Mannie & Co., and by the latter to Texcott Co., were not in the performance of a "recognized distributive function" within the meaning of that term as used in the applicable regulations.

2. Whether the court below erred in affirming the trial court's finding that Texcott Co. was a jobber.

3. Whether the court below erred in holding that the trial court did not abuse its discretion in issuing an injunction requiring defendants to comply with the pricing, record keeping, and invoicing requirements of the applicable regulations, and enjoining them from making further overcharges.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942 and of the applicable regulations are set forth in the Appendix, *infra*, pp. 18-30.

STATEMENT

Mercantile Trading Company (hereinafter referred to as Mercantile) is a partnership consisting of Meyer Fefferman, Manuel Fefferman, and Rose Fefferman, which has an office and warehouse at 2436 South Michigan Avenue, Chicago, Illinois (R. 64-65, 85). Mannie & Co. (hereinafter referred to as Mannie) is a corporation owned principally by Etta Fefferman, whose husband, the aforesaid Manuel Fefferman, managed the business for her. This corporation, which was formed in April, 1941, has an office at 120 South La Salle Street, Chicago, where one person is employed, samples are kept, and orders received (R. 65-66). Mannie purchased 95% of its merchandise from Mercantile, who filled and shipped the orders received by Mannie directly to Mannie's purchasers (R. 66-67). Mannie sold to all classes of customers, manufacturers, wholesalers, retailers, and ultimate consumers (R. 69, 101-102). Among its customers was Texcott & Co., of 39 South La Salle Street, Chicago, which made sales to public and private institutions (R. 90-93).

Mercantile sold to Mannie who in turn sold to Texcott and others certain blue denim, bed linens, and unbleached duck, each transaction at a price which included a markup over cost (R. 43, 69, 78). Section 1316.51 of Revised Price Schedule 35, section 1316.101 (b) of Revised Price

Schedule 89, and Section 1400.104 of Maximum Price Regulation 118 respectively¹ establish the maximum prices of these items, for sales by any person, at a prescribed mill price, except where such commodities are sold by a person performing "a recognized distributive function." Where such a recognized distributive function is performed, the General Maximum Price Regulation² applies instead, establishing the maximum price at the highest price charged by the seller in March, 1942. The respective prices charged by Mercantile and Mannie were higher than the mill prices (R. 130).

Mercantile also sold to Mannie who sold to Texcott and others certain finished piece goods, each transaction at a markup over cost (R. 43, 69, 78). Section 1400.82 (h) (4) (i) of Maximum Price Regulation 127³ applicable to such goods, provides for a jobber's markup to be computed pursuant to a certain formula, where such goods are sold in the performance of a recognized distributive function, but no such markup may be taken unless this standard is met, i. e., unless the sale advances the goods to the next stage of distribution. All of the aforementioned regulations contain record-keeping and invoicing requirements.

A complaint in two counts was filed by the Price Administrator, the first count asking for

¹ Hereinafter referred to as RPS 35, RPS 89, and MPR 118, respectively.

² Hereinafter referred to as the GMPR.

³ Hereinafter referred to as MPR 127.

statutory damages on account of the overceiling sales, the second requesting an injunction to compel compliance with the record-keeping and invoicing requirements of all of the aforementioned regulations⁴ and to restrain future overceiling sales or other violations of these regulations. Upon stipulation of the parties, the court limited the trial to the issues raised by the second count, reserving the issues raised by the first count for determination, if necessary, after final adjudication of the other issues. The petition here is concerned only with the issues raised by the second count.

The trial court found that Mercantile, Mannie, and Texcott were all jobbers of cotton textiles in the city of Chicago; that the sales of blue denim, bed linens, and unbleached duck fell within the coverage of RPS 35, RPS 89, and MPR 118, respectively, when not made in the performance of a recognized distributive function, and were within the coverage of GMPR instead when otherwise made; that the sales from Mercantile to Mannie and from Mannie to Texcott were not sales in the performance of a recognized distributive function; that all sales of finished piece goods by Mercantile or by Mannie were within the coverage of MPR 127; and that in the course of their various transactions

⁴ Mercantile was not originally charged with having violated the General Maximum Price Regulation. The complaint was amended after the trial to include an allegation to that effect (R. 167-169).

Mercantile and Mannie had each violated the pricing, record-keeping, and invoicing requirements of all five regulations (R. 128-131). Petitioners were therefore ordered to comply with such pricing, record-keeping, and invoicing requirements of all five regulations. (R. 132-141.) The circuit court of appeals affirmed the judgment of the trial court, holding that there was substantial evidence to support the findings of the trial court, and that the trial court had not abused its discretion in granting the injunction (R. 182-192).

ARGUMENT

I

(A) The findings of the trial court that sales from Mercantile to Mannie and from Mannie to Texcott were not in performance of a "recognized distributive function" were amply sustained by the evidence, and rightly affirmed by the court below.

Both Mercantile and Mannie were jobbers or wholesalers (R. 112, 114, 46). As petitioners state, "with respect to the transactions upon which the respondent relies here, it is conceded that both Mercantile and Mannie were making wholesale sales" (Petition, p. 15, note 19). They sold to the same type of customers, chiefly to other jobbers and to private and public institutions. Except when their sales were "in performance of a recognized distributive function", e. g. when

they sold to institutional consumers their ceiling prices were limited by the regulations to the mill prices. The purpose of this rule was the prevention of the pyramiding of prices through successive markups by a number of agents in the channel of distribution none of whom made any material economic contribution towards the process of getting the goods from the manufacturer to the consumer. The text of the Regulations and the official interpretations thereof make it clear that sales from one jobber or wholesaler to another are typically not "in performance of a recognized distributive function,"⁵ and there was expert testimony to the same effect (R. 52-54).

⁵ Maximum Price Regulations 118 and 127, *infra*, pp. 22-25 provide that "no sale is made in the performance of a recognized distributive function unless it advances the goods to the next stage of distribution." MPR 118 also provides that: "Presumptively, sales by one jobber to another, or by one manufacturer to another, engaged in the same type of business, are not sales in the performance of a recognized distributive function." RPS's 35 and 89, which were issued earlier than the other regulations, do not specifically define "in performance of a recognized distributive function," but official administrative interpretations of these regulations recognize the same presumption that sales by one wholesaler or jobber to another wholesaler or jobber do not satisfy the test. Manual of Digests of Interpretations of Specific Price Schedules and Regulations, March 15, 1943, pp. 28-30, *infra*. These interpretations are "of controlling weight unless * * * plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414.

Petitioners can derive no comfort from the statement in Digest No. 444 of the Interpretations (*infra*, p. 30) that

That Mercantile's sales to Mannie did not advance the goods to a later stage of distribution is further evidenced by the fact that because of its particular personnel and its operating practice Mannie functioned largely as a mere adjunct to or a sales agent for Mercantile (R. 64-67; 83-84).

Similarly, the sales by Mannie to Texcott did not perform a "recognized distributive function", for, as the trial court found (R. 128) on uncontroverted evidence (R. 91-92), Texcott was a wholesaler or jobber. And the fact that Texcott sold to institutions, public and private, does not make it a retailer, since it is common knowledge that such institutions, whose purchases are normally large in scale, generally purchase directly from wholesalers. Nor do wholesalers who sell to such institutions become retailers merely because

"a jobber to jobber sale *may be* in the performance of a recognized distributive function, where the buying jobber is not a competitor of the selling jobber in the same line of goods, and if the buying jobber has, in the normal course of business, previously bought goods from jobbers of the same class as the seller." [*Italics added*]. This statement does not say that in such event a jobber to a jobber sale is necessarily in the performance of a recognized distributive function, but merely that it may be such (if the sale otherwise meets the test). It would scarcely apply to a situation in which the purchaser could do nothing more to advance the goods towards the consumers than his vendor had done. Moreover, Mercantile and Mannie clearly did sell the same line of goods, and petitioner's assertion that Mercantile sold in Cook County and Mannie outside, is not maintainable in the light of the admission that Mercantile sold to anyone who came in to buy (R. 37) and of the admitted fact that Mannie sold to Texcott, a Chicago jobber (R. 91-92).

the institutions may themselves be ultimate consumers.* Finally, petitioners' argument that Texcott's sales to public and private institutions made Texcott a retailer is inconsistent with petitioners' admission that despite the fact that its sales were made mostly to institutions (R. 102), Mannie was a wholesaler (Petition, p. 15, note 19; R. 112).

It is clear, therefore, that there was ample substantial evidence to support the findings of the trial court that the sales by Mercantile to Mannie and by Mannie to Texcott were not in the performance of a "recognized distributive function". These findings will not be disturbed unless they are clearly erroneous, and the fact that the trial court and the appellate court concurred as to the inference to be drawn from the facts, fortifies the conclusion that the findings are not erroneous. See *United States v. Commercial Credit Co., Inc.*, 286 U. S. 63, 67; *Williams Manufacturing Co. v. Shoe Machine Corp.*, 316 U. S. 364, 367; *Goodyear Tire & Rubber Co., Inc. v. Ray-O-Vac Co.*, 321 U. S. 275, 278.

* Petitioners invoke the definition of "sale at retail" in Sec. 1499.20 (o) of the GMPR (*infra*, pp. 27-28). First it should be noted that the GMPR would be inapplicable except to those textile items which (1) were sold in performance of a recognized distributive function, and (2) were not subject to MPR 127; and, secondly, that assuming the pricing and other requirements of GMPR to be applicable to such sales and the definitions to be relevant to such requirements, the definitions do not determine the answer to the question

(B) Insofar as petitioners contend that these regulations, as interpreted, contravene Section 2 (h) of the Act, forbidding the Administrator to change certain established business practices, the

whether the sales by Mannie to Texcott performed a recognized distributive function.

At any rate, the cited definition is, with certain exceptions, in terms of a sale "to an ultimate consumer *other than* an industrial or commercial user." (*Italics added*). There is, of course, no inconsistency in an ultimate consumer's being a commercial user (Cf. *Bowles v. Seminole Rock & Sand Co.*, 145 F. 2d 482 (C. C. A. 5), reversed on another ground, 325 U. S. 410; *Speten v. Bowles*, 146 F. 2d 602 (C. C. A. 8), certiorari denied, 324 U. S. 877.) Nor would the fact that some of the institutional buyers were nonprofit in character affect the fact that sales to the other institutions were to commercial users. Nor would it even foreclose the conclusion that such non-profit institutions were commercial users, just as the non-profit character of a government employees' cooperative furnishing medical services was held not to preclude the conclusion that the enterprise was "engaged in business or trade" so as to make the Sherman Act applicable to a combination directed at restraining the operations of the cooperative. *American Medical Association v. United States*, 317 U. S. 519.

Petitioners' claim, however, that the provision in Section 1499.20 (o) exempting from the scope of "sale at retail" for purposes of filing and posting requirements of the Regulation, any sale to specified types of institutions, shows that for other purposes, the sales to institutions are to be regarded as sales at retail. Even if that were true, those other purposes consist of the application of certain pricing provisions in Sec. 3 of the GMPR, whereas we are here concerned, we repeat, with the entirely different question: Is Texcott a wholesaler or jobber in the sense that a sale to it by its wholesaler supplier Mannie does not advance the goods to the next recognized stage of distribution? The answer to this question is not dependent on the cited definitions which are applicable only to certain pricing and filing requirements of the GMPR.

short answer is that this contention goes to the validity of the regulations and hence cannot be made in the enforcement court but only in the Emergency Court of Appeals. Emergency Price Control Act of 1942, Section 204 (d); *Yakus v. United States*, 321 U. S. 414. This was specifically held with respect to an argument based on Section 2 (h) in *Bowles v. Sanden & Ferguson Co.*, 149 F. 2d 320 (C. C. A. 9), and *Henderson v. Burd*, 133 F. 2d 515, 517 (C. C. A. 2); see also *United States v. Pepper Brothers*, 142 F. 2d 340, 343 (C. C. A. 3). Furthermore, even where the contention that a pricing regulation is invalid because it contravenes Section 2 (h) of the Act has been properly raised before the Emergency Court of Appeals, it has been held that the prohibitions of that section do not bar the Administrator from regulating pricing practices. *Philadelphia Coke Co. v. Bowles*, 139 F. 2d 349 (E. C. A.); *Crawford & Doherty Foundry Co. v. Bowles*, 146 F. 2d 861 (E. C. A.). And it was clearly the intention of Congress that practices, such as those involved in the case at bar, in which a series of middlemen all at the same stage of distribution sell to one another at successive markups, should be abolished. In reporting on the bill which later became the Emergency Price Control Act of 1942, the Committee on Banking and Currency of the Senate said:

In order to achieve effective price control it may often be necessary to regulate or prohibit practices which are * * * likely to result in * * * increases inconsistent with the purposes of the bill * * * Examples of such practices in connection with a commodity include * * * the unnecessary multiplication of middlemen * * *. [S. Rep. No. 931, 77th Cong., 2d sess., p. 17. (See also H. Rep. No. 1409, 77th Cong., 1st sess., p. 6.)]

II

Petitioners contend that the district court abused its discretion in its grant of injunctive relief. The miscellaneous grounds for this contention are all unsound.

(A) With respect to the violations of RPS 35, RPS 89, and MPR 118, petitioners assert that granting of the injunction was improper because their sales were in the performance of a recognized distributive function, hence subject to the GMPR instead of those regulations. This assertion rests on a premise which has already been shown to be without legal foundation (*supra*, pp. 6-9).

(B) Petitioners further claim that the granting of the injunction was improper to the extent that it was based on MPR 127 because the record shows no price violations of this regulation, and because the admitted violations of the record-

keeping and invoicing requirements were due to a good faith belief that the GMPR governed their sales of bleached duck, which mistaken belief allegedly was the result of misleading information received from an OPA representative. With respect to price violations the record is clear that although no markup was permitted either Mercantile or Mannie by MPR 127, since their sales did not advance the distributive process, yet both Mercantile and Mannie always sold at a profit (R. 43, 69). The propriety of the injunctive relief against price violations is further sustained by the admitted violations of the record-keeping and invoicing requirements. *Bowles v. Leithold*, 155 F. 2d 124 (C. C. A. 3) certiorari denied, March 25, 1946, *sub nom. Leithold v. Porter*, No. 826, October Term, 1945. Nor were the latter violations of MPR 127 excused by the claimed good faith belief in the applicability of the GMPR. Meyer Fefferman, the most active partner in Mercantile, testified that until an OPA employee informed him of it, he had never heard of MPR's 127, 118, or RPS 35 (R. 117); and he was unfamiliar even with the GMPR (R. 38-40). Although he knew of the existence of the Emergency Price Control Act and its implementing regulations, he testified that he never inquired to find out what the regulations provided (R. 123-124). Inflation is fostered as readily by persons who close their eyes to price regulations and sell

obey them,
regulations,

at illegal prices or otherwise fa
as it is by those who, knowing ved and re-
nevertheless violate them. en to them

Petitioners contend that they ce Adminis-
lied upon misleading information took place
by representatives of the Office of representa-
tration. Petitioners' violations information
before their conferences with C sequent viola-
tives cannot be attributed to any lministrator
they later received; and as to the rpretations
tions, it is well settled that th ployees, not
cannot be estopped by the casual d standards
given by any of his thousands o Procedural
made in accordance with the put F. R. 8961);
for official interpretations. Rev F. R. 8961);
Regulation No. 1, Secs. 1300.51-50 F. 2d 597
Bowles v. Indianapolis Glove C, 794; *Bowles*
(C. C. A. 7), certiorari denied, 326); *Bowles v.*
v. Lentin, 151 F. 2d 615 (C. C. ells *Lamont*
Sisk, 144 F. 2d 163 (C. C. A. 4), certiorari
Corp. v. Bowles, 149 F. 2d 364 (E., there was
denied, 326 U. S. 730. Consequetion of this
sound basis for the trial court's
contention.

(C) Petitioners also assert the trial court
erred in allowing the respondent's trial but
before judgment, to amend his lings to con-
form to the proof and allege a ation of the
GMPR by Mercantile. However, le 15 (b) of
the Federal Rules of Civil Pro e authorizes

amendments to conform to the evidence "at any time, even after judgment." And Rule 15 (c) provides that "Whenever the claim or defense asserted in the amended pleadings arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading". Hence there can be no issue here of the statute of limitations. Nor is it true, as petitioner asserts, that the government injected a new issue into the case after trial, since it was petitioner who asserted throughout that its sales fell under the GMPR rather than MPR 118, RPS 35, or RPS 89, and that its sales under MPR 127 were mistakenly believed to be under the GMPR instead.

Petitioners' further assertion that the record shows no violations of GMPR by Mercantile is without foundation. Meyer Fefferman admitted that he was unfamiliar with the GMPR and had never read any of its terms (R. 38), and instead of charging base period prices as required, Mercantile took its "cost plus traditional markup" as a ceiling (R. 38, 49). Nor did Mercantile ever try to find out what was required of it under the GMPR (R. 123-124). The same is true with respect to violations of the record-keeping requirements by Mercantile. Although the issuance of the GMPR was attended by the greatest publicity,

Meyer Fefferman disclaimed any knowledge of its terms or any knowledge of what a "base period statement" under GMPR meant (R. 38, 39-40), and he never did anything to find out what the regulations were (R. 123-124). On the basis of petitioner's own admissions, the court was justified in inferring that Mercantile had failed to comply with any of the provisions of the GMPR, including the record-keeping and invoicing requirements.

(D) Petitioner Mannie concedes three violations of the ceiling prices established by the GMPR, but asserts that they constituted merely scattered clerical errors and that since it is now willing to comply, an injunction is not necessary. With respect to the three violations conceded, it was demonstrated by the evidence that of the *four* textile items which were sold in the base-period, *three* were later offered for sale or delivered at prices higher than the base-period or maximum prices. (R. 70-74). Mannie was obviously ignoring the basic requirements of the GMPR. When asked the question, "What does delivery in March have to do with the GMPR?", Manuel Fefferman, who managed the corporation, replied, "I don't know." (R. 105-106.)

In short, the record abounds with evidence that petitioners disregarded the requirements of any and all price regulations which were applicable to their transactions. They sold at prices over

the ceilings, their invoices did not comply with the established rules, and they failed to keep the required records. Hence, the district court did not abuse its discretion in enjoining repetition of all such violations, and the court below did not err in affirming the district court's judgment.

CONCLUSION

The decision of the court below is clearly correct. There is no conflict of decision, and no question of public importance is presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

✓ J. HOWARD McGRATH,
Solicitor General.
 ✓ JOHN R. BENNEY,
Attorney.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
 ✓ DAVID LONDON,
Director, Litigation Division,
 SAMUEL MERMIN,
Solicitor, Litigation Division,
 ALBERT J. ROSENTHAL,
Attorney,
Office of Price Administration.

SEPTEMBER 1946.

APPENDIX

PERTINENT PROVISIONS OF THE EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED

(56 Stat. 23; 58 Stat. 632; 50 U. S. C. App., Supp.
V, 901 et seq.)

SEC. 2 (h). The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, establish in any industry,¹ except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

SEC. 4 (a). It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of

¹ Section 2 (h) was amended by the Stabilization Extension Act of 1944, 58 Stat. 632, to read as follows:

"SEC. 2 (h). The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, or changes in established rental practices, except where such action is affirmatively found by the Administrator to be necessary to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."

any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

SECTION 205 (a). Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

SECTION 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell," "selling," "sellers," "buy," and "buyer," shall be construed accordingly.

PERTINENT PROVISIONS OF REVISED PRICE SCHEDULE 35

(6 F. R. 5335; 7 F. R. 714, 931, 1270; 9 F. R. 2790)

SECTION 1316.51. *Maximum prices for cotton goods.*—On and after the applicable ceiling date (as set forth in Appendix A, incorporated herein as § 1316.61), regardless of the terms of any contract of sale or purchase, or other commitment, no person shall sell, offer to sell, deliver or trans-

fer cotton goods, and no person shall buy, offer to buy, or accept delivery of cotton goods, at prices higher than the maximum prices provided for in this Revised Price Schedule, except that:

* * * *

(b) Except as may be expressly provided elsewhere herein, the provisions of Price Schedule No. 35 are not applicable to sales or deliveries of cotton goods made by any wholesaler, jobber, or retailer in the performance of a recognized distributive function: Provided, That sales and deliveries of cotton goods (1) to a converter or finisher, or (2) by the manufacturer thereof or by any agent of such manufacturer shall not be made at prices higher than the established maximum prices.

SECTION 1316.54. *Records and reports.*—Every person making purchases or sales of cotton goods after October 20, 1941, shall keep for inspection by the Office of Price Administration for a period of not less than one year, complete and accurate records of (a) each such purchase or sale, showing the date thereof, the name and address of the buyer or the seller, the price paid or received, and the quantity in yards of each construction purchased or sold; (b) the quantity in yards of cotton goods (1) on hand, and (2) on order, as of the close of each calendar month; and (c) in the case of manufacturers, the quantity in yards or pounds of each construction of cotton goods manufactured during each calendar month.

Persons affected by Price Schedule No. 35 shall submit such reports to the Office of Price Administration as it may, from time to time, require.

SECTION 1316.55. *Details required in contract of sale and invoice.*—(a) Every seller of cotton goods shall, with respect to each sale thereof, deliver to the purchaser a contract of sale which shall contain, in addition to the terms thereof, (1) the date on which the sale or contract of sale was made; (2) a full description of each construction of cotton goods sold, including (i) the width; (ii) in the case of grey goods, the cloth count; (iii) the number of yards per pound; (iv) where necessary to determine the applicable maximum price, the yarn numbers used in the warp and filling, or the average yarn numbers, as the case may be; and (v) where, in conformity with Price Schedule No. 35, a premium is charged or deduction made, the feature of the goods or of their manufacture for which such premium is allowed or deduction required; and (3) the discount, if any, allowed for prompt payment.

**PERTINENT PROVISIONS OF REVISED PRICE
SCHEDULE 89**

(7 F. R. 715, 2299)

SECTION 1316.101. *Maximum prices for bed linens.*—(a) On and after February 2, 1942, regardless of the terms of any contract of sale or purchase, or other commitment, no person shall sell, offer to sell, deliver or transfer bed linens, and no person shall buy, offer to buy, or accept delivery of bed linens at prices higher than the maximum prices set forth in Appendix A, incorporated herein as § 1316.111.

(b) The provisions of Revised Price Schedule No. 89 are not applicable:

(1) To sales or deliveries of bed linens made by any wholesaler, jobber, or retailer in the performance of a recognized distributive function. * * *

SECTION 1316.104. *Records and reports.*—(a) Every person making a purchase or a sale of bed linens after February 2, 1942, shall, if such transaction is subject to the provisions of this Revised Price Schedule No. 89, keep for inspection by the Office of Price Administration for a period of not less than one year complete and accurate records of: (1) each such purchase or sale, showing the date thereof, the name and address of the buyer or the seller, the price paid or received, and the quantity in yards or dozens of pieces of each type of bed linens purchased or sold; and (2) in the case of manufacturers, the quantity in yards or dozens of pieces of each type of bed linens manufactured during each calendar month.

PERTINENT PROVISIONS OF MAXIMUM PRICE REGULATION 118

(7 F. R. 3038, 3824, 9969)

SECTION 1400.104. *Wholesalers, jobbers, and retailers.*—Except as specific maximum prices for sales by persons other than producers may be provided in § 1400.118 the provisions of this Maximum Price Regulation No. 118 are not applicable:

(a) To sales and deliveries of cotton products in the performance of a recognized distributive function* by any wholesaler, jobber, or retailer not

*No sale is made in the performance of a recognized distributive function, within the meaning of this Maximum Price Regulation No. 118 unless it advances the goods sold to the next stage of distribution. Presumptively, sales by

controlling, controlled by, or under common control with the producer.

SECTION 1400.109. *Records.*—(a) Every seller subject to this Maximum Price Regulation No. 118 shall preserve for inspection by the Office of Price Administration until at least June 30, 1943, the records of all his sales and deliveries of cotton products between January 1, 1941 and May 3, 1942, inclusive.

(b) Every person making purchases, sales, or deliveries of cotton products on or after May 4, 1942, shall keep for inspection by the Office of Price Administration for a period of not less than two years complete and accurate records of each such purchase, sale or delivery, showing the date thereof, the name and address of the buyer or of the seller, the price paid or received, and the quantity of each type, construction, and grade purchased or sold, and including (in the case of the seller) a record of the manner in which the maximum price, including the adjustment for spot cotton, for the sale was determined.

SECTION 1400.112. *Details required in contract of sale or invoice.*—(a) Every seller of cotton products, with respect to each contract of sale thereof, shall deliver to the purchaser a written contract of sale which shall contain, in addition to the terms thereof, (1) the date on which the sale or contract of sale was made; (2) a full description of each type, construction, and grade of cotton product sold, including the number of yards or

one jobber to another, or by one manufacturer to another engaged in the same type of business, are not sales in the performance of a recognized distributive function. [This footnote is part of regulation.]

other units of measure or quantity per pound; and (3) if the applicable maximum price is established by § 1400.101 (b) and (d), a computation of such maximum price, in the form set forth below, for each type, construction, and grade sold.

PERTINENT PROVISIONS OF MAXIMUM PRICE
REGULATION 127

(7 F. R. 3119, 4180, 4762)

SECTION 1400.75. *Records.*—(a) On and after May 4, 1942, every person making a purchase, sale or delivery of finished piece goods in the course of trade or business, or otherwise dealing in finished piece goods shall keep for inspection by the Office of Price Administration, for a period of not less than two years, complete and accurate records of each such purchase, sale, or delivery, showing the date thereof, the terms of sale, the name and address of the buyer or seller, the price paid or received, and the quantity of each type, quality and finish of finished piece goods purchased or sold, and including (in the case of the seller) a record of all items necessary to verify the computation of the maximum price for the finished piece goods.

SECTION 1400.77. *Details required in contract of sale or invoice.*—(a) Every seller of finished piece goods shall, with respect to each sale thereof, deliver to the purchaser and the purchaser shall retain as a part of his records, either a contract of sale or an invoice which shall contain, in addition to the terms thereof, a full description of each type, quality and finish of finished piece goods sold, or a style number or symbol sufficient to

identify in the seller's records maintained pursuant to § 1400.75 hereof, the full details of the construction so delivered.

SECTION 1400.81 (a).

(6) "Sales at retail" means sales to the ultimate consumer: *Provided*, That no cutter, manufacturer, purchaser for resale, or other commercial user shall be deemed to be an ultimate consumer.

SECTION 1400.82 (h) (4).

(i) *Wholesalers and jobbers*—(1) *General Provisions*.—Subject to the other provisions of this paragraph, the maximum price for finished piece goods sold in the performance of a recognized distributive function* by a wholesaler, jobber or converter-jobber selling jobbed goods, shall be computed by dividing the actual cost by .83 if the sale is to be a Class II purchaser and by dividing the actual cost by .88 if the sale is to a Class I purchaser: *Provided*, That contracts entered into between May 4, 1942, and June 3, 1942, at prices in compliance with the provisions of this Maximum Price Regulation No. 127 (§§ 1400.71 to 1400.84, inclusive), as then in force, may be carried out at the contract price.

*No sale is made "in the performance of a recognized distributive function" within the meaning of this Maximum Price Regulation No. 127 unless it advances the goods sold to the next stage of distribution. [This footnote is part of regulation.]

**PERTINENT PROVISIONS OF THE GENERAL MAXIMUM
PRICE REGULATION**

(7 F. R. 3153, 4659; 9 F. R. 1385)

SECTION 1499.1. Prohibition against dealing in commodities or services above maximum prices.—

On and after the effective date of this General Maximum Price Regulation, regardless of any contract or other obligation:

(a) No person shall sell or deliver any commodity, and no person shall sell or supply any service, at a price higher than the maximum price permitted by this General Maximum Price Regulation; * * *

SECTION 1499.2. *Maximum prices for commodities and services: general provisions.*—Except as otherwise provided in this Regulation, the seller's maximum price for any commodity or service shall be:

(a) The highest price charged by the seller during March 1942:

(1) For the same commodity or service; * * *.

For the purposes of this General Maximum Price Regulation, the highest price charged by a seller during March 1942 shall be:

(a) The highest price which the seller charged for a commodity delivered or service supplied by him during March 1942 to a purchaser of the same class; or

(b) If the seller made no such delivery or supplied no such service during March 1942, his highest offering price for delivery or supply during that month to a purchaser of the same class; * * *.

SECTION 1499.11. *Base-Period records.*—Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation, shall:

(a) Preserve for examination by the Office of Price Administration all his existing records relating to the prices which he charged for such of those commodities or services as he delivered or supplied during March 1942, and his offering prices for delivery or supply of such commodities or services during such month; and

(b) Prepare, on or before July 1, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing:

(1) The highest prices which he charged for such of those commodities or services as he delivered or supplied during March 1942 and his offering prices for delivery or supply of such commodities or services during such month, together with an appropriate description or identification of each such commodity or service; * * *

SECTION 1499.12. *Current Records.*—Every person selling commodities or services for which, upon sale by that person, maximum prices are established by this General Maximum Price Regulation shall keep, and make available for examination by the Office of Price Administration, records of the same kind as he has customarily kept, relating to the prices which he charged for such of those commodities or services as he sold after the effective date of this General Maximum Price Regulation; and, in addition, records showing, as precisely as possible, the basis upon which he determined maximum prices for those commodities or services.

SECTION 1499.20 (o). "Sale at retail" means a sale to an ultimate consumer other than an industrial or commercial user, except that the purpose of § 1499.3 of this General Maximum Price Regulation a "sale at retail" shall not include any sale to the United States, any other government or any of its political subdivisions, any religious, educational or charitable institution for the sick, deaf, aged or insane, or any school, hospital, library or

SECTION 1499.20 (p). "Sale at retail, library or a sale by a person who buys² resells it, without substantially wholesale" means to any person other than the commodity and except that, for the purposes of changing its form, General Maximum Price Repeat consumer, wholesale shall include any sale 1499.3 of this to an industrial or commercial sale at

SECTION 1499.21. *Effect of* by such person
tions.—Sections 1499.13, 1499.14.

and 1499.25 of this General Maximum Price Regulation shall apply but the other provisions of this Regulation shall not apply to any sale or delivery, under the provisions of this Regulation issued, or which may be issued, by the

Office of Price Administration, unless otherwise provided in any such price regulation.

EXCERPTS FROM MANUAL OF DIGEST OF INTERPRETATIONS OF SPECIFIC PRICE SCHEDULES AND REGULATIONS, OFFICE OF PRICE ADMINISTRATION, MARCH 15, 1943

Interpretations of Specific Price Schedules and Regulations, Office of Price Administration, Washington, D. C. March 15, 1943

A. Under Revised Price Schedule 35.

(394) *General.*—The Schedule is applicable to sales and purchases of carded grey and colored-yarn cotton goods of the types and specifications listed in Appendix A. Sales by wholesalers, jobbers, or retailers in the performance of a recognized distributive function are not covered. However, sales to converters or finishers and sales by manufacturers, or an agent of the manufacturer are subject to the Schedule.

* * * * *

(400) *Jobbers, Wholesalers—Not Recognized Distributive Functions.*—The following have been held not to be jobbers “in the performance of a recognized distributive function” within the meaning of that term in Section 1316.51:

* * * * *

(3) Sales by one wholesaler or jobber to another wholesaler or jobber are, presumptively, not sales in the performance of a recognized distributive function, since the sale will not carry the goods forward to the next stage in the distributive process. A contrary ruling would open the door to re-

peated second-hand sales, resulting in pyramiding of wholesalers' and jobbers' margins.

(5) A sale by one manufacturer to another manufacturer, is, presumptively, not in the performance of a recognized distributive function, because it is a sale at the same level or stage and does not carry the goods to the next stage in the distributive process. Therefore, where a manufacturer of grey goods also buys grey goods from other manufacturers and resells the goods to the manufacturing trade, he is subject to the Schedule. 7-15-42.

B. Under Revised Price Schedule 89.

(426) *Sales in Performance of a Recognized Distributive Function.*—The following sales are usually in the performance of a recognized distributive function: Sales by a prime jobber to an institutional jobber; and institutional jobber to an institution; and by an importer to another wholesaler. 10-15-42.

(428) *Jobbers, Wholesalers—Not Recognized Distributive Functions.*—See Digest No. (365).

[NOTE: Digest No. 365 under Maximum Price Regulation 11 is identical with Digest No. 400 (3) above.]

(429) *Jobber to Jobber Sale.*—See Digest No. (444).

C. Under Maximum Price Regulation 118.

(444) *Jobber to Jobber Sale.*—A sale by one jobber to another jobber is, generally, subject to the Regulation, since such a sale is, presumptively, not in the performance of a recognized distribu-

tive function. A jobber to jobber sale may be in the performance of a recognized distributive function, where the buying jobber is not a competitor of the selling jobber in the same line of goods, and if the buying jobber has, in the normal course of his business, previously bought goods from jobbers of the same class as the seller. 8-6-42.